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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of FCC MAIL ROOM

Amendment of the Commission's)
Rules Regarding Installment Payment)
Financing for Personal)
Communications Services (PCS))
Licensees)

WT Docket No. 97-82

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Comments of AirGate Wireless, L.L.C.

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Summary

AirGate supports the proposals for the auction contained in the Further Notice with the following additional suggestions:

(1) The Commission should announce a short form application filing date for the auction of no later than June 15, 1998 and auction all C block licenses (a) returned to the Commission; and (b) held by the Commission due to bidder defaults on the down payment;

(2) The Commission should exclude from participation in the auction all entities -- including their control group members and affiliates -- that have defaulted on their PCS license obligations to the FCC outside selection of a restructuring option provided in the Second Report and Order;

(3) The Commission should not impose a financial review of bidders. Such a review will delay the process and is not necessary in an auction that is all cash or provides more limited installment payment financing;

(4) The Commission should set the upfront payment at \$0.02 per MHz/Pop (\$0.60 Per Pop);

(5) The Commission should not tie the minimum opening bid in an all cash or mainly cash auction to inflated C block high bids that reflect generous financing terms that will not be available in the next auction;

(6) The Commission should provide limited installment payment financing of two years to entrepreneurs and a two tiered bidding credit; and

(7) The Commission should clarify the interpretation of its anti-collusion rules to provide bidders will clear guidelines for placing bids in the auction.

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Comments of AirGate Wireless, L.L.C.

AirGate Wireless, L.L.C. ("AirGate") hereby submits its comments in response to the Further Notice of Proposed Rulemaking adopted by the Commission on September 25, 1997 in the above-referenced proceeding (the "Further Notice").¹ AirGate currently holds four F block PCS licenses for markets in North and South Carolina. AirGate's affiliate, AirLink, L.L.C., participated in the original C block auction and placed a \$20 Million upfront payment to participate in that auction. AirLink withdrew from the C block auction in Round 42 based on its firm belief that in many markets the bid prices were unreasonably high and that the FCC strictly would enforce its payment rules.

AirGate generally supports the proposals for the auction contained in the Further Notice with the following additional suggestions:

¹ In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-342 (rel. Oct. 16, 1997). The Second Report and Order elements of the Commission's action are referred to herein as the Second Report and Order.

(1) The Commission should announce a short form application filing date for the auction of no later than June 15, 1998 and auction all C block licenses (a) returned to the Commission; and (b) held by the Commission due to bidder defaults on the down payment;

(2) The Commission should exclude from participation in the auction all entities -- including their control group members and affiliates -- that have defaulted on their PCS license obligations to the FCC outside selection of a restructuring option provided in the Second Report and Order;

(3) The Commission should not impose a financial review of bidders. Such a review will delay the process and is not necessary in an auction that is all cash or provides more limited installment payment financing;

(4) The Commission should set the upfront payment at \$0.02 per MHz/Pop (\$0.60 Per Pop);

(5) The Commission should not tie the minimum opening bid in an all cash or mainly cash auction to inflated C block high bids that reflect generous financing terms that will not be available in the next auction;

(6) The Commission should provide limited installment payment financing of two years to entrepreneurs and a two tiered bidding credit; and

(7) The Commission should clarify the interpretation of its anti-collusion rules to provide bidders will clear guidelines for placing bids in the auction.

I. A SWIFT REACTION OF ALL AVAILABLE C BLOCK SPECTRUM WILL BEST SERVE THE PUBLIC INTEREST

A swift reaction of all available C block spectrum is the most efficient means of promoting additional growth in competitive wireless services and getting additional services to the public. As proposed in the Further Notice, the auction should include:

(1) all C block spectrum returned to the Commission pursuant to the reasonable options for restructuring provided to C block licensees in the Second Report and Order; and

(2) all C block spectrum that remains with the Commission as a result of bidder defaults on the down payments.

The simultaneous availability of this spectrum in a single auction is important to permit bidders to fully evaluate the license opportunities. In addition, the value of individual licenses is dependent on the universe of available licenses. The ability to cluster licenses and create

geographic service regions will increase participation in the auction and best serve to speed the continued deployment of PCS.

The Commission should include in the auction all C block licenses on which bidders have defaulted on their down payments. The Commission consistently has declined to issue C block licenses to bidders that default on their required down payments. Currently, a number of C block licenses fall into this category but, unlike prior defaulted licenses, have not been promptly reauctioned.² These licenses are not subject to the options adopted by the Commission in the Second Report and Order. Those restructuring options are specifically limited to licensees who satisfied their full downpayment obligations.³ Consistent with its prior treatment of high bidders that fail to submit the required down payment, the FCC should ensure those defaulted licenses are available in the auction.

AirGate also encourages the Commission to establish a short form application filing date for the auction of no later than June 15, 1998. A prompt auction that begins with the short form filing within the first six months of 1998 is important to promote robust license values and strong auction participation. This date also provides ample time for full implementation of the restructuring options contained in the Second Report and Order. On January 15, 1998, the Commission will be notified by C block licensees of their election of a restructuring option. At this time, the universe of licenses available for reauctioning will be known. On June 1, 1998, the sixty day grace period for submitting the reinstated installment payments will expire. If any licensee fails to make its payment, the licensee will be in default and its licenses will be revoked

² See Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B12, B335 and B436, Order, DA 97-980 (rel. April 28, 1997) (application for review filed May 28, 1997 pending). Carolina PCS I was the high bidder for markets in South Carolina in the original C block auction that ended over a year and a half ago on May 6, 1997. Eighteen C block licenses were reauctioned 2 months after the C block auction closed. These licenses were reauctioned due to bidder defaults.

and subject to reauction. Accordingly, by setting a short form application filing date of no later than June 15, 1998, the Commission will provide amply opportunity for all available licenses to be returned and give prospective bidders notice to prepare for the auction. The announcement of a short form filing date also provides certainty that an auction will occur. Such certainty is required for sound business planning by prospective bidders.

II. BIDDERS THAT HAVE DEFAULTED ON THEIR OBLIGATIONS TO THE GOVERNMENT SHOULD BE EXCLUDED FROM BIDDING IN THE AUCTION

AirGate agrees with the proposal in the Further Notice to limit eligibility to participate in the reauction of C block spectrum to: (1) entities that meet the qualifications at the time the short form application is filed; (2) entities that participated in the original C block auction; and (3) current C block licensees. The Commission should exclude from participation entities -- including their control group members and affiliates -- that have defaulted on their PCS license obligations to the FCC outside selection of a restructuring option provided in the Second Report and Order. Entities that have failed to make their downpayments or otherwise defaulted have demonstrated, contrary to their certification on the short form application to participate in the auction, that they are not financially qualified to hold an FCC license.⁴ Bidders who failed to submit the required down payment clearly violated FCC Rule 1.2107(b) which requires high bidders to submit the additional funds necessary to bring their payments up to the required 10% downpayment.⁵ The Commission has the authority pursuant to FCC Rule 1.2109(d) to prohibit bidders who have violated the Commission's rules from participating in future auctions. Such a

³ See Second Report and Order at n. 160 ("This decision does not affect our policy with regard to defaults on first or second down payments").

⁴ 47 C.F.R. § 1.2105(a)(2)(v).

⁵ 47 C.F.R. § 1.2107(b).

prohibition is appropriate here and sends the proper signal about the penalties that will be attached to false certifications to the Commission.

III. IMPOSITION OF A FINANCIAL SCREENING TEST IS NOT NECESSARY AND WILL LIMIT PARTICIPATION IN THE AUCTION

Exclusion of defaulting bidders from the auction eliminates the need to impose additional requirements for a financial showing by prospective bidders. The Commission should not impose a financial review of bidders in the auction, nor should it impose any threshold financial requirements beyond an upfront payment of \$.02 MHz/Pop. A financial review is not necessary for four reasons.

First, the Commission proposes in the Further Notice to hold the auction as an “all cash” auction and to eliminate installment payments as a means of financing entrepreneurs. AirGate encourages the Commission to pursue a more pro-entrepreneur policy that provides limited installment payments that parallel the financing provided to F block PCS licensees, *i.e.* interest only for two years with the remaining principal and interest amortized over the subsequent eight year license term. If a “cash auction” is required, however, a financial showing of full payment will be required before the license is awarded. This “all cash” requirement will impose its own financial review. Payment in full for the licenses is the ultimate test of financial qualifications to hold the license. If payment in full is not received, the license will not be awarded.

Second, the appropriate standard for determining threshold financial qualifications would be difficult to establish. The financial qualifications for bidding in the auction depend inherently on the auction prices. If the prices are low, many bidders may qualify. As the bid prices increase, however, bidders may be eliminated or become disqualified financially. In the C block auction over one-half of the bidders left the auction in a self imposed financial disqualification. Those that remained presumably have now learned this fundamental business lesson. If a financial showing is required, the Commission will have to establish a projected value of the

spectrum and assess financial qualifications based on this projection. In competitive bidding, however, it is role of the bidding itself that sets the “market” value. Prior to the C block auction, many analysts predicted that the average bid price would be in the range of \$15.00 a Pop. This prediction was far below the average net price per Pop of over \$39 at the end of the auction. This experience demonstrates that the Commission should steer clear of predicting spectrum values and should not impose a financial threshold beyond the upfront payment.

Third, entrepreneurs and small businesses will have a difficult time passing a stringent financial review. The Commission properly intends to limit the auction to entrepreneurs as a means to achieve the laudable goals of diversity in licensing set forth in Section 309(j) of the Communications Act.⁶ By their very nature, however, most entrepreneurs and small businesses do not have balance sheets or income statements that demonstrate years of positive cash flow, operating profits or significant assets. Depending on the benchmark for the financial review, many potential bidders are unlikely to meet the qualifications thereby dampening participation in the auction. In addition, investors in a bidder may make their commitments contingent on the auction’s outcome – an outcome that is unknown at the time of the short form filing. Investors may also make the investment decision after the short form is filed – providing a bidder with the financial wherewithal during and after the auction but not at the short form filing deadline.

Fourth and finally, a detailed review of each applicant’s financial qualifications would delay the auction and be inefficient. The Commission’s auctions thus far have been run efficiently through a streamlined electronic filing process. The addition of a financial review process is likely to require weeks and possibly months (depending on the number of applications) for review that will stall the auction process.

⁶ 47 U.S.C. S 309(j).

IV. THE UPFRONT PAYMENT SHOULD BE \$0.02 PER MHZ/POP (\$0.60 PER POP)

The D, E and F blocks auction demonstrate that an upfront payment of \$0.60 per Pop permits a wide range of applicants to participate in the auction and is a reasonable check on bidders' financial qualifications. An upfront payment of \$0.02 per MHz/Pop would require bidders to deposit \$0.60 per Pop – the same upfront payment required for the D, E and F block auction. By contrast, the proposed upfront payment of \$0.06 MHz/Pop would require a \$1.8 per Pop upfront payment that could dampen participation and limit eligibility in the auction – an essential element to a highly competitive auction. This upfront payment could limit bidder eligibility to bid on multiple markets while not providing any increased guarantee of financial viability. In addition, if the auction has more limited financing terms as in F or is “all cash” as proposed by the Commission, these rules – more than the upfront payment rules – will ensure that financially qualified bidders participate in the auction. An upfront payment in excess of \$0.02 per MHz/Pop may also preclude participation by companies for larger markets even though the companies may be fully qualified to pay the final bid price. Accordingly, the Commission should use its tested and proven upfront payment of \$0.60 per Pop by requesting an upfront payment of \$0.02 MHz/Pop.

V. A MINIMUM OPENING BID SHOULD NOT BE TIED TO C BLOCK PRICES

The massive defaults (and threatened defaults) by C block licensees demonstrate that the C block final bid prices are not the appropriate proxy for determining a minimum opening bid. Adoption of this proxy would result in artificially high opening bids and could limit bidding. A comparison of ten percent of the final high bids for all PCS blocks demonstrates that on average, the C block prices were approximately three times the price of the A and B block MTA licenses and significantly more than the D, E and F block BTA licenses.

Selected Markets -- 10% Minimum Bids for Each Block

Market	C	A (MTA)	B(MTA)	D	E	F
Atlanta	\$6.2	\$2.8	\$2.6	\$1.1	\$1.1	\$0.79
Jacksonville	\$3.4	\$2.0	\$1.9	\$1.4	\$1.2	\$0.76
Tampa	\$4.3	\$1.6	\$1.8	\$2.1	\$1.7	\$0.026
Miami	\$6.1	\$2.6	\$2.4	\$0.53	\$0.55	\$0.84
Charlotte	\$5.0	\$0.68	\$0.73	\$0.34	\$0.32	\$0.45

The inflated nature of the C block bids make its inappropriate to use them as a benchmark for the opening bids for the reauction.⁷ Indeed, several C block bidders were unable to make the 10% downpayment and defaulted on their high bids.

Use of the C block auction also requires adjustment to the final bid prices to reflect the bidding discount and the terms of the financing. The C block auction included not only percentage bidding discounts based on size but also six years of interest only. Use of the C block "net bid", however, only accounts for the bidding discount and does not account for the "value" of the installment payments. In order to use the C block prices, the "net price" would have to be adjusted further to reduce the price to reflect the value bidders attached to the installment payment financing. This adjustment is necessary because of the dramatic reduction, and possible elimination, of financing terms from the original C block auction. The changes proposed by the Commission in the Further Notice will produce different valuations and bid prices. Bidders will bid more for a license with terms financed by the government that they will bid for licenses at a "all cash" auction or a mainly cash auction. For example, in the D, E and F block auction, Omnipoint Corporation, bidding as OPSCE-Galloway Consortium, acquired the E and F block Miami BTA licenses. Its final net bid for the F block was \$8.40 Per Pop while its final E block bid was \$5.50 Per Pop amounting to a approximately \$9.5 Million difference in the final net bid.

⁷ At the FCC's June 30, 1997 forum on PCS C and F block installment payment issues, members of the financial panel indicated that a "severe haircut" of the final C block prices was required for many of the C block bidders to obtain financing.

Bids in particular markets also often reflect strategic values inherent to the high bidder and may not necessarily reflect a pure "market" value.

In addition, the C block high bids do not reflect the impact of time and changing market conditions on the license valuations. The C block auction was the third PCS license auctioned. Accordingly, C block players were perceived as the third market entrant. If the auction process proposed in the Further Notice begins in the second quarter of 1998, it is likely that it will be concluded over the summer with licenses awarded in the fourth quarter of 1998. After this auction, winning bidders are likely to be the fifth or sixth PCS market entrant and enter a market with several well established PCS providers. These competitive factors change dramatically the perceived valuation of the remaining C block licenses.

As an alternative to a percentage of the C block high bid, AirGate proposes that the Commission use 10% of the final F block prices as the proxy for the minimum opening bid. The F block is the most recent entrepreneur's block PCS auction and most reflects current market conditions.

VI. THE COMMISSION SHOULD NOT DISCARD INSTALLMENT PAYMENTS ENTIRELY BUT SHOULD INCLUDE THE MORE MODEST PAYMENTS APPLIED TO THE F BLOCK

Installment payments are the most valuable form of financing for entrepreneurs in an auction. Many entrepreneurs have recognized their importance and value and honored their commitments to the government by making the payments due under their C block notes. A few have not and their miscalculation now threatens to hamper the future prospects for other entrepreneurs and small businesses. The Commission should not base its policy on the poor business judgment of a few bidders.

As history demonstrates, perhaps the installment payment plan for the C block auction was too generous and promoted speculative, unsustainable bidding. History also demonstrates that more limited installment payments, as given in the F block, can continue to promote

participation by entrepreneurs and small businesses without putting the government at a collection risk.

An installment payment plan permits entrepreneurs to focus in the first two critical years on getting operational and establishing a revenue base that can service the license debt. In a cash only auction, entrepreneurs will need to finance the full license costs at equity or debt rates that will demand significant returns. This will require more allocation of capital to license costs and less to building the network and delivering service. Installment payments provide entrepreneurs access to capital at reasonable interest rates that would not be obtainable in the financial markets. The deferral of interest also provides licensees the breathing room to establish their businesses while servicing the interest on the government debt.

Without any form of installment payments it is likely that participation in the auction will be limited. Only companies with available cash or an ability to tap the equity and debt markets will be able to succeed. In AirGate's view, few investors or lenders will be willing to commit to fund a company to participate in an auction when the outcome is unknown and requires an immediate full outlay of the license price. The cost to entrepreneurs will be tremendous and may make participation in the auction impossible. The Commission should carefully assess the consequences of eliminating all installment payments and evaluate the benefits of providing more limited installment payment financing as in the F block auction.

VII. TWO TIERED BIDDING CREDITS ARE APPROPRIATE

A two tiered bidding credit for small and very small businesses as proposed by the Commission is appropriate for the auction. A tiered credit is particularly important if the auction is an "all cash" auction or includes limited installment payments for high bidders. The tiered credits recognize the varying degrees of difficulty in accessing capital that is inherent to a business' size. The tiered credits also will promote a wide dissemination of licenses to a range of small businesses. The Commission should clarify, however, that it will determine the size of

individual bidders at the time the short form is filed not at the time of the original C block auction. Many original C block applicants, now C block licensees, have demonstrated their ability to raise capital, deploy networks and generate revenues. While these companies should be permitted to participate in the auction, their eligibility for bidding credits should be determined based on their financial position at the time of the short form filing. If these financial resources are not accounted for, smaller entrants and new bidders will be hampered in their ability to compete in the auction. The bidding credits only will serve their important purpose of promoting wide participation and a wide dissemination of licenses if eligibility is determined at the time of the short form filing.

VIII. THE COMMISSION SHOULD CLARIFY ITS INTERPRETATION OF ITS ANTI-COLLUSION RULES TO BIDS PLACED DURING THE AUCTION

The Commission's recent Notice of Apparent Liability issued to Mercury PCS II, L.L.C.⁸ --- casts substantial doubt on the proper interpretation of the Commission's anti-collusion rules for bidding in a public simultaneous competitive auction. The Notice of Apparent Liability finds Mercury PCS II, L.L.C.'s decision to engage in "reflexive pair" bidding even without an agreement with another bidder violated the anti-collusion rules. The finding is based on the rule's provision that a bidder shall not disclose "in any manner" its bidding strategy. The scope of this rule should be clarified before the auction starts so bidders are on notice as to precisely what bidding behavior the Commission considers to be a "disclosure" prohibited by the rules. Without this clarification, bidders who truly believe that they are complying with the rules and are not improperly disclosing their bidding strategies could later be questioned by some alternative interpretation of their behavior after the auction ends.

This rule clarification also is essential to the integrity of the auction process. The auctions have been a model for competitive bidding. In all of the entrepreneur's block auctions,

AirGate has observed aggressive competitive bidding. This process should not be tainted by post-auction interpretations of a rule that is ambiguous and does not provide bidders with a clear guideline for permissible and impermissible behavior in placing their bids in a public auction.

Respectfully submitted,


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Dated: November 13, 1997

⁸ Application of Mercury PCS II., LLC For Facilities In The Broadband Personal Communications Systems in the D, E and F Blocks, *Notice of Apparent Liability*, FCC 97-388 (rel. Oct. 28, 1997).